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Case Comment

Criminal evidence: spouse compellability - hearsay evidence - rape - indecent assault

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Subject: Criminal evidence

Keywords: Admissibility; Compellability; Hearsay evidence; Spouses; Witness statements

Legislation: Police and Criminal Evidence Act 1984 s.80

Criminal Justice Act 2003

Case: R. v L [2008] EWCA Crim 973; [2009] 1 W.L.R. 626 (CA (Crim Div))

*Cov. L.J. 27 Facts

On January 19 2007 the appellant's 19 year-old daughter complained to the police that she had been raped by her father in her flat on January 9 2007. She told the police that she had been subjected to indecent assault (as it then was) by her father since the age of 10 years and that from 16 years of age the indecent assault had amounted to rape.

The complainant was the appellant's youngest daughter and she suffered from partial deafness and speech problems. In October 2006 she had left home to live in a flat but she had returned home over Christmas following trouble with her neighbours. On January 9 the appellant had returned with her to the flat to help her prepare to move out. The complainant said that her father had locked the door and forced her to have sexual intercourse with him on the sofa and that he had ejaculated on the floor and the sofa and had then wiped himself with a towel. An examination of the flat resulted in seminal fluid from the appellant being found on the carpet near the sofa and on a towel lying on the sofa. In interview the appellant sought to explain the presence of his semen on the carpet and towel by saying that he had had intercourse with his wife on the sofa when they had stayed at the flat in October 2006.

Whilst the appellant was in custody the police asked his wife (Mrs L) about the stay in the flat in October. She said that as far as she could remember they all went to bed at the same time and she did not recall having sexual intercourse with the appellant. She told the police that if they had sex it would have been in bed and that they had never had sex in any other part of their daughter's flat. At trial Mrs L told the witness service that this statement was not true and had been made up by the police. The trial judge accepted that Mrs L was not a compellable witness under s.80 of the Police and Criminal Evidence Act 1984 (PACE) as the evidence related to an offence which *Cov. L.J. 28 took place when the daughter was aged 19 years. Mrs L declined to give evidence. The prosecution then applied to admit Mrs L's statement under s.114(1)(d) of the Criminal Justice Act 2003 which provides for the admissibility of a hearsay statement where the court is satisfied it is in the interests of justice to admit it. The trial judge ruled that Mrs L's statement was admissible. The appellant was convicted and appealed on the grounds that the judge was wrong to admit Mrs L's statement and that the police should have informed L's wife that she would not be a compellable witness against L before taking her statement.

Decision

The Court of Appeal held, dismissing the appeal, that the conviction was safe whether or not the admission of Mrs L's statement was lawful. The Court held that there is no requirement for the police to tell a wife that she is not a compellable witness against her husband prior to interviewing her about an offence of which her husband is suspected. It was felt that there may be circumstances where it would be appropriate for the police to tell

the wife she was not a compellable witness against her husband. If at trial the admissibility of the wife's statement is an issue before the court the prosecution will be in a stronger position if they can show the wife made the statement voluntarily when she was aware she was under no obligation to make it.

The Court of Appeal was of the view that compelling a wife to give evidence is not the same as permitting another to give evidence of the wife's voluntary statement and s.80 of the PACE Act 1984 does not pose a legal bar to the admission of such a statement. However, it recognised that taking a statement from a wife intending to call her as a witness and then seeking to place that statement in evidence after she has clearly indicated she does not wish to give evidence against her husband could be objectionable. In this situation whether or not admitting the statement in evidence would be in the interests of justice would depend on the circumstances of the case, and the law has made it clear that convicting a husband of child abuse takes precedence over marital harmony.

Commentary

At common law, subject to limited exceptions, a spouse was neither a competent nor compellable witness for the prosecution against his/her partner. The rationale for this related to disturbing marital harmony and that the spouse had an interest in the outcome of the proceedings and may be biased. The Criminal Law Revision Committee in its 11th Report (Cmnd 4991) (1972) opined that a spouse should be competent (if she wished to testify, preventing it would show excessive concern for marital harmony). They also believed that the spouse should be compellable in certain circumstances and these views were adopted and extended by s.80 of the PACE Act 1984. Under the current law a spouse (or civil partner) is a competent witness against their partner, in all circumstances, by virtue of s.53 of the Youth Justice and Criminal Evidence Act 1999. Section 80(2)(A)(b) PACE provides that the spouse will only be a compellable witness against their partner where the evidence is in respect of a specified offence; s.80(3) provides that an offence is specified if it involves assault on, or injury or threat of injury to the spouse or a person under 16 years or it is a sexual offence against a person under 16 years of age. Hence, a spouse cannot be compelled to testify against his or her partner unless the offence falls within this narrow category of offences irrespective of how serious the offence is.

***Cov. L.J. 29** The wife's evidence went before the Court under s.114(1)(d) of the Criminal Justice Act 2003 as it was considered to be in the interests of justice. Although the Court of Appeal held that s.80 PACE posed no legal bar to the admission under s.114(1)(d) it is right to question the correctness of having a statutory provision (s80 PACE) which in effect protects the spouse against compellability if it was so clearly in the interests of justice to admit this evidence. Section 114(2) provides a non-exhaustive list of criteria to be considered by the court when deciding whether to admit evidence under s114(1)(d) and one of those factors is s114(2)(g) ‘whether oral evidence of the matter stated can be given and, if not, why it cannot’. In this case the oral evidence could not be given because the spouse was not a compellable witness under s.80 PACE so it is pertinent to argue that s114 should not be used to ride roughshod over s.80 PACE. This is clearly not a satisfactory position.

In addition, the Court of Appeal raised the issue of whether the evidence relating to this latest incident could be said to be ‘in respect of’ the earlier offences when the daughter was under 16 years and whether the wife could have been held to be compellable on this basis. The Court of Appeal was of the view that this was not a point that they needed to resolve and did not consider it further. The evidence of Mrs L related directly to the incident on January 9, and although evidence of this assault was in broad terms relevant to the defendant's conduct over the years, including the indecent assaults prior to the daughter reaching 16 years, it is perhaps stretching the meaning of ‘in respect of’ to argue that the evidence of the rape on January 9 was evidence ‘in respect of’ the earlier indecent assaults for which the wife would have been compellable. It may be easier to make out this argument if there was a specific *modus operandi* linking the rape and the earlier indecent assaults so that evidence the wife had to give became more directly relevant to the earlier indecent assaults; however, this was not the case.

It is time to accept that in the 21st century the ‘sanctity’ of marriage should not override the function of the criminal justice system in convicting the guilty and the right of the victim to see justice done. The Court of Appeal clearly felt that in this case where a 19 year old girl had been raped it was in the interests of justice that the spouse's evidence be put before the court. In *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 Lord Wilberforce stated that ordinary people would find it repugnant that a spouse could be required to give evidence against the accused; nearly thirty years on, it is surely repugnant to ordinary people that a spouse is not required to give evidence in an offence such as rape.

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